No. 75-1710

In the Supreme Court of the United States

OCTOBER TERM, 1976

RANKIN COUNTY BOARD OF EDUCATION, ET AL.,
PETITIONERS

v.

KENNETH W. ADAMS, ET. AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted in response to this Court's invitation of October 4, 1976.

STATEMENT

Private plaintiffs initiated this school desegregation suit in August 1967, alleging that the Rankin County Board of Education and its members were violating 42 U.S.C. 1983 by operating the school system in a racially discriminatory manner.[1] The dis-

[1] The jurisdiction of the district court was invoked under 28 U.S.C. 1343(3).

trict court concluded that a violation of the Constitution had occurred and ordered the School Board to implement a "freedom of choice" plan to desegregate the schools.

In 1969 plaintiffs sought revision of the "freedom of choice" desegregation plan in light of *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, and *Singleton* v. *Jackson Municipal Separate School District,* 419 F.2d 1211 (C.A. 5). On December 31, 1969, the district court ordered petitioners to change faculty and staff assignments, in accord with the *Singleton* requirements, not later than February 1, 1970.[2] In April 1970 the district court ordered a new desegregation plan, incorporating its earlier order regarding reassignment of faculty and staff, to be implemented for the 1970–1971 school year.

[2] The court required (order filed January 2, 1970, p. 2):

"If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school district which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the school district. In addition if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

"Prior to such a reduction, the school board will develop or require the development of non-racial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school district."

The United States sought leave to participate in this case as *amicus curiae* with the rights of a party. In February 1971 the district court, finding that "the maintenance and preservation of the due administration of justice and the integrity of the judicial process requires that the public interest be represented" in this case, ordered [3]—

> that the United States of America be and is hereby designated to appear and participate in this action before this Court as amicus curiae, with the right as such to submit pleadings, evidence, arguments and briefs, to move for injunctive and other necessary and proper relief, and to initiate such further proceedings that may be necessary and appropriate.

The United States then immediately moved the district court [4]—

> to require the defendants to offer to rehire and award back pay to all Negro teachers who have been discriminatorily dismissed by Rankin County School officials subsequent to January 2, 1970, to reinstate all former Negro principals and assistant principals who were discriminatorily demoted by Rankin County School officials subsequent to January 2, 1970, and to adopt objective non-racial criteria for the demotion and dismissal of faculty and staff members.

The district court held an evidentiary hearing. After concluding that there had been "glaring defi-

[3] Order filed February 26, 1971.

[4] Motion for Enforcement of the Court's Order, dated February 25, 1971, p. 1.

ciencies"[5] in the enforcement of its previous orders,[6] the court directed petitioners immediately to formulate non-racial, objective criteria for use in hiring faculty and staff.[7] The court also ordered that black faculty and staff not retained after January 2, 1970 (the date faculty desegregation was ordered), "be re-evaluated, under the proper standards, and those who qualify equally to white teachers hired since January 2, 1970, must be offered the opportunity for reemployment * * *."[8] The court set for later consideration the identification of individual staff members "who ultimately are found to have been discriminatorily dismissed and who then may be due back pay."[9]

The court of appeals held that the district court had used the wrong legal standard in passing upon the propriety of the faculty and staff dismissals. 485 F. 2d 324, 326. It stated that under the principle announced in *United States* v. *Jefferson County Board of Education,* 380 F. 2d 385, 394 (C.A. 5), certiorari denied, 389 U.S. 840, faculty members dismissed during the desegregation process who are qualified for the jobs must be rehired over new persons, regardless of the qualifications of the new persons. 485 F. 2d at 326. It remanded the case to the district court with

[5] Opinion and Order filed June 16, 1971, p. 3.

[6] There had been a 26-percent decline in the number of black teachers in 1970–1971, the year the new desegregation plan was implemented. 485 F. 2d 324, 326.

[7] Opinion and Order filed June 16, 1971, p. 7.

[8] *Ibid.*

[9] *Id.* at 3.

the following directions (485 F. 2d at 327): "If black educators have been discriminated against, in spite of their qualifications for the job the Court must order their reinstatement with appropriate backpay and other equitable relief as required in each individual circumstance." The court of appeals also instructed the district court to make findings of fact and conclusions of law with respect to each person who raised the claim of faculty or staff discrimination. *Ibid.*

On remand the district court again required petitioners immediately to adopt objective, non-racial criteria for selection and retention of faculty and staff and to apply these criteria "to all of the faculty and staff employed by the school district at the time of the dismissals or demotions in question, which was on or about the conclusion of the 1969–70 school year."[10]

At the time of the remand, 42 faculty and staff members had asserted that they had been dismissed or demoted in violation of the *Singleton* requirements and the district court's orders. On July 11, 1974, the district court filed a "Report to the Fifth Circuit Court of Appeals" containing findings of fact with respect to these 42 persons. The court concluded that 13 persons had been the victims of racial discrimination and approved a stipulation of the parties (see Adams Br. in Opp. App. 1a–17a) to the extent that it resolved the reinstatement claims of 20 additional faculty and staff members.[11]

Although the stipulation also provided for awards of back pay to certain former employees, the district

[10] Order filed November 12, 1973, p. 2.

[11] Report to the Fifth Circuit Court of Appeals, filed July 11, 1974, p. 12.

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court refused to approve any award of back pay and explicitly reserved its ruling on that issue. The court stated that it had "grave misgivings that the assessment of such liability against the board will run afoul of the recent holding of the Supreme Court in *Edelman* v. *Jordan* * * *." [12] The court also reserved ruling on that portion of the United States' April 12, 1974, motion seeking back pay, concluding that the United States' status as a virtual plaintiff was immaterial to the sovereign immunity question.[13] In a "Supplemental Report to the Fifth Circuit Court of Appeals" the district court again reserved ruling on the propriety of back pay awards, this time noting that a similar issue was pending in another case before the Fifth Circuit.[14]

On February 3, 1975, the district court adopted "as a final judgment" its "Reports" to the court of appeals. Once again the district court stated that it "reserves ruling on the question of whether the Eleventh Amendment to the United States Constitution precludes either an award of back pay by this Court or this Court's approval of a stipulation which would resolve certain claims for reinstatement with back pay that have been raised in this case" (Pet. App. A3).

The private plaintiffs appealed the district court's failure to order the reinstatement of nine other faculty and staff members and its failure to award back

[12] *Id.* at 12–13.

[13] *Id.* at 13, 15.

[14] Supplemental Report to the Fifth Circuit Court of Appeals, filed December 20, 1974, pp. 2–3.

pay. The United States filed a brief as *amicus curiae* in the court of appeals supporting plaintiffs regarding the reinstatement claim. The United States stated with respect to back pay, however, that "we do not believe that the court's reservation of that issue is properly appealable at this time." [15]

The court of appeals affirmed the district court's disposition of the requests for reinstatement. 524 F.2d 928.[16] As to the back pay issue, the court held (*id.* at 929):

> [T]he Eleventh Amendment does not bar the award of back pay to those teachers who were reinstated since the suit is in reality not against the state itself but against what is primarily a local institution. Accordingly, we remand this case to the District Court with the instructions that it calculate and award back pay to those teachers who were reinstated in accordance with the stipulation of the parties concerning this subject which was filed April 12, 1974 * * * or by order of the District Court * * *.

DISCUSSION

Petitioners present questions concerning (1) the jurisdiction of the court of appeals to direct the award of back pay to the reinstated teachers; (2) the Eleventh Amendment immunity of a school board against an award of damages for a violation of the Constitution; and (3) the amenability of a school board to

[15] Br. 6 n. 16.

[16] The opinion set out in Pet. App. A1–A–2 was amended following a limited grant of rehearing at the request of the private plaintiffs and consequently should be disregarded.

suit under 42 U.S.C. 1983. The United States submits that the petition should be denied.

There is a substantial question whether the court of appeals had appellate jurisdiction to pass upon the back pay issue, but the peculiar facts of this case—including a 1974 stipulation between the parties that back pay awards were appropriate—render it sufficiently unusual that review by this Court is inappropriate. The Eleventh Amendment issue has been carefully considered by two other district judges in Mississippi and by the court of appeals in this case; each has resolved it adversely to the Board's position. Finally, the question whether a school board may be sued under Section 1983 either has not been properly preserved by the Board or, if preserved, remains open to argument in the district court on remand. We elaborate on these observations below.

1. Although the district court called its December 1, 1975, order a "final order," it was "final" only to the extent that it disposed of the requests for reinstatement. The district court explicitly reserved decision on the request for awards of back pay. The court's order therefore was not final in all respects. *Liberty Mutual Insurance Co.* v. *Wetzel,* 424 U.S. 737.

The portions of the order denying reinstatement to nine persons were appealable because they constituted a denial of requests for equitable relief. The request for back pay was a request for restitution, also a form of equitable relief. See *Porter* v. *Warner Holding Co.,* 328 U.S. 395; *Morelock* v. *NCR Corp.,* 546 F. 2d 682 (C.A. 6) (collecting cases). But the district court's decision to postpone resolution of the issues raised by

the request for back pay was not the denial of an interlocutory or permanent injunction. It also was not a "final decision" within the meaning of 28 U.S.C. 1291. It therefore was not independently appealable.

The fact that the reinstatement issues were before the court of appeals did not give it appellate jurisdiction of the request for back pay. A statute allowing interlocutory appeals concerning one portion of a court's order does not by that token permit an appellate court to pass upon every unresolved claim for relief pending before the district court. As the Court stated in *Ex parte National Enameling and Stamping Co.,* 201 U.S. 156, 162, in construing a predecessor of Section 1292(a)(1), "[o]bviously that which is contemplated is a review of the interlocutory order [or injunction], and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree." [16]

[16] See also *New York* v. *Nuclear Regulatory Commission,* 550 F. 2d 745, 759–761 (C.A. 2); *Drop Dead Co.* v. *S. C. Johnson & Son, Inc.,* 326 F 2d 87 (CA. 9), certiorari denied, 377 U.S. 907; *Loew's Drive-In Theatres, Inc.* v. *Park-In Theatres, Inc.* 174 F. 2d 547 (C.A. 1), certiorari denied, 338 U.S. 822; *Caterpillar Tractor Co.* v. *International Harvester Co.,* 120 F. 2d 82 (C.A. 3.)

There is an exception to this rule if resolution of the issues controlling the nonappealable matters would control resolution of the matters properly appealable; in these circumstances, the court will rule upon the nonappealable matters in the interest of judicial economy. *Deckert* v. *Independence Shares Corp.,* 311 U.S. 282, 287. The issues underlying the back pay claims in the present case, however, need not have been resolved in order to dispose of the reinstatement claims, and consequently this exception does not apply. Moreover, the court could not dispose of the request for restitution by reaching and deciding any of the back pay issues. No resolution of the request for back pay would either bring the case to an end or obviate the need to decide other issues properly before the court.

The court of appeals did not articulate its reasons for passing on the back pay question.[17] It would have been entitled to have concluded, however, that the district court's continuing refusal to decide an issue that had been pending since 1971 (see pages 3–6, *supra*), in a case in which the parties had stipulated in 1974 that back pay relief was appropriate (see page 6, *supra*), warranted the exercise of supervisory jurisdiction in the nature of mandamus. Cf. *Connor* v. *Coleman*, 425 U.S. 675; see also *United States* v. *Lynd*, 301 F. 2d 818, 822 (C.A. 5) (failure to rule on motion for preliminary injunction was "refusing * * * an injunction" within the meaning of 28 U.S.C. 1292(a)(1)); *Liberty Mutual Insurance Co.* v. *Wetzel*, *supra*, 424 U.S. at 744–745. Use of mandamus, or of an action of that nature, would have been particularly appropriate here, since the only reason the district court gave for its lengthy delay in disposing of the request for back pay—the Eleventh Amendment question—does not appear to pose a substantial barrier to awards of back pay (see pages 11–12, *infa*).

[17] The Fifth Circuit has stated that, under certain circumstances, it will pass upon unresolved back pay claims whenever it has jurisdiction of other portions of a case. See *Myers* v. *Gilman Paper Corp.*, 544 F. 2d 837, 847. It relied on *Deckert*, *supra*, as authority for this decision, but for the reasons we have discussed at pages 9–10 and n. 16, *supra*, this disposition may be improper to the extent it represents an assertion of appellate jurisdiction.

Consequently, although the matter is not free from doubt, the court of appeals' disposition of the requests for back pay was not a usurpation of jurisdiction. Facts like those of this case are unlikely to recur frequently, and we therefore believe that the jurisdictional issue does not presently require the attention of this Court.[18]

2. The two other questions presented are whether petitioner Rankin County Board of Education possesses Eleventh Amendment immunity against a suit for damages in federal court and whether the Board is a "person" within the meaning of 42 U.S.C. 1983. Although these are not issues that a court of appeals should be quick to decide in advance of their resolution by the district court, their resolution in this case does not appear to have been incorrect or prejudicial to petitioners.

a. Petitioners' contention that the Eleventh Amendment erects a shield against suit in federal court "turns on whether the [Rankin County Board of Education] is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend. The answer depends at least in part upon the nature of the entity created by state law." *Mt. Healthy City School District Board of Education* v. *Doyle*, No. 75–1278, decided January 11,

[18] If review of a similar issue should prove to be warranted, a case such as *Myers* v. *Gilman Paper Corp.*, *supra*, might be a more appropriate vehicle.

1977, slip op. 5. That inquiry often may involve the taking of evidence or the consideration of local laws that would not appropriately be undertaken in the first instance by a court of appeals. The local law that governs the present case, however, already has been thoroughly canvassed by other district courts in Mississippi [19] and was expressly considered by the court of appeals (see 524 F. 2d at 929 and n. 4). The Board, which did not raise this defense below, has not suggested what evidence it might adduce on this issue in the district court. Accordingly, in the absence of any suggestion of prejudice (cf. *Singleton* v. *Wulff*, 428 U.S. 106, 120), the court of appeals was entitled to resolve the Eleventh Amendment issue. The proper resolution of that question depends primarily upon the interpretation of state law and does not warrant review by this Court.

b. The question whether petitioner Rankin County Board of Education is a "person" against which damages may be awarded under Section 1983 is "an extremely important question and one which should not be decided on [an inadequate] record." *Mt. Healthy, supra,* slip op. 3. It is a question that has divided the courts of appeals.[20] The court of appeals did not address the issue in this case, nor did the district court.

[19] See Br. in Opp. App. 18a–21a.

[20] The Eighth Circuit alone has held that school districts are "persons" under Section 1983. Compare *Keckeisen* v. *Independent School District 612*, 509 F. 2d 1062 (C.A. 8): and *Floyd* v. *Trice*, 490 F. 2d 1154 (C.A. 8); with *Mims* v. *Board of Education*, 523

It may be unnecessary to reach the issue here because individual members of the Board of Education, as well as the Board itself, have been named as defendants. If the Board is not a "person" it may be dismissed as a party and its individual members ordered to pay damages for the consequences of their acts of racial discrimination. Following the reasoning of *Monroe* v. *Pape,* 365 U.S. 167, several courts of appeals have held that this is the proper procedure.[21] But two other courts of appeals—including the Fifth Circuit *en banc* in a decision rendered after the decision of the panel in the present case—have held that, if an entity that is not a "person" agrees to reimburse its officers or employees for any liability they may incur, then they are not amenable to suit under Section 1983. See *Muzquiz* v. *City of San Antonio,* 528 F. 2d 499 (C.A. 5) (*en banc*), petition for a writ of certiorari pending (No. 75–1723); *Monell* v. *Department of Social Services,* 532 F. 2d 259 (C.A. 2), certiorari granted, January 25, 1977 (No. 75–1914). These

F. 2d 711 (C.A. 7); *Burt* v. *Board of Trustees*, 521 F. 2d 1201 (C.A. 4); *Sterzing* v. *Fort Bend Independent School District*, 496 F. 2d 92 (C.A. 5); *Akron Board of Education* v. *State Board of Education*, 490 F. 2d 1285 (C.A. 6), certiorari denied, 417 U.S. 932.

The issue arises in this case only in the context of a demand for back pay; petitioners do not seek review of the order to reinstate certain persons (see Pet. 8 and n. 2). But petitioners' argument that Section 1983 does not apply to school boards is troubling because, if accepted, it might foreclose the possibility of even injunctive relief against racial discrimination by school boards, in the absence of a special authorizing statute such as Title VII of the Civil Rights Act of 1964.

[21] See *Burt, supra; Akron Board of Education, supra; Sterzing, supra.*

courts reason that the school district or other non-"person" is the "real" defendant in such cases because it will pay the judgment, and that consequently the district court lacks power over all defendants, including natural persons who in other circumstances undoubtedly would be "persons" under Section 1983.[22]

Muzquiz and *Monell,* if followed, would allow States and other entities to erect for their employees an absolute shield of immunity against damages actions. By generously offering to reimburse employees, States could prevent their employees from having liabilities to meet. This might preclude some injured persons from recovering at all.

However that may be, the Court need not consider these problems in the present posture of this case. It is not clear what arrangement petitioner Board of Education may have for reimbursing its members for any damages liability, and it is not clear whether the Fifth Circuit would apply *Muzquiz* to a case, like this one, in which the back pay liability is predicated upon the violation of an injunction issued by the district court.[23]

[22] *Monell* holds that agents and employees who will be reimbursed for damages liability are "persons" for purposes of injunctive relief.

[23] Respondents argue that the Section 1983 contentions of petitioners are not presented in this case because the district court has jurisdiction under Title VII of the Civil Rights Act of 1964, 78 Stat. 266, 261, as amended, 42 U.S.C. (Supp. V) 2000h–2 and 2000e–6 (Br. in Opp. 4). This argument apparently stems from respondents' mistaken belief that the United States "intervened" (Br. in Opp. 3) in this case under Title VII. Although the court of appeals characterized the participation of the United States as

More importantly, petitioners did not raise this issue until their petition for rehearing in the court of appeals, and that court did not pass upon it (see 524 F.2d at 928–929). Petitioners thus have not properly preserved the issue for resolution by this Court. Indeed, petitioners' stipulation that the reinstated teachers were entitled to back pay (Br. in Opp. App. 16a–17a) may implicitly waive this contention.[24] Because this case involves a violation of an injunction[25] and because the court of appeals did not address the issue, it is unnecessary for the Court to hold this case pending its disposition of *Monell.*

3. The Court should deny the petition. If, however, the Court determines that the court of appeals' treatment of the case was improper, we respectfully submit that it would be appropriate for the district court

"intervention" (485 F. 2d at 326), that is incorrect. The United States is proceeding by leave of the district court as *amicus curiae* with the rights to file pleadings and move for relief, but it is not a party and it has not filed a complaint. It did not state, in its motion of February 1971 or in any other paper filed in the district court, that it was invoking the district court's jurisdiction under the Civil Rights Act of 1964.

Respondents also contend that by filing the stipulation the Board of Education waived any argument based on Section 1983. But a true "jurisdictional" defect may not be waived, because the consent of the parties does not confer subject matter jurisdiction upon the district court. *Mt. Healthy, supra,* slip op. 4.

[24] If this defense to a Section 1983 action cannot be so waived, then petitioners would be free to present it to the district court on remand, since the court of appeals has not ruled on it.

[25] The district court's injunction was appropriate whether or not it had the authority to award back pay (*Edelman* v. *Jordan*, 415 U.S. 651), and once the injunction had been entered petitioners were obliged to comply (*Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 438–440).

to be directed to render a final judgment on the back pay issues within a short time after receiving this case on remand. The first motion for back pay was filed in 1971, the parties stipulated in 1974 that back pay was due, and a final resolution of this case is long overdue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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